**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| | ) | |
| Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers | ) | CC Docket No. 01-338 |
| | ) | |
| Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 | ) | CC Docket No. 96-98 |
| | ) | |
| Deployment of Wireline Services Offering Advanced Telecommunications Capability | ) | CC Docket No. 98-147 |

# OPPOSITION OF MCI TO BELLSOUTH, SUREWEST AND USIIA PETITIONS FOR RECONSIDERATION


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## EXECUTIVE SUMMARY

In their petitions for reconsideration, BellSouth, USIIA and SureWest seek to undo many of the decisions in the *Triennial Review Order*. Although the petitions are couched in the language of broadband services, they are in fact driven in large part by a desire to avoid unbundling requirements for narrowband services and traditional DS1 and DS3 loops. Separately, each request for reconsideration (or "clarification") chips away at an important part of the FCC's decision. In combination, however, the requests for reconsideration would eviscerate the Commission's *Triennial Review Order,* denying mass market and enterprise customers the ability to have a choice of service providers. The Commission should therefore deny each of these petitions in its entirety.

Specifically, the FCC should: (1) refrain from expanding the fiber-to-the-home ("FTTH") unbundling rules to include fiber-to-the-curb ("FTTC"); (2) decline to extend its FTTH rules to encompass fiber deployed to multiunit buildings; (3) prevent incumbent local exchange carriers ("LECs") from escaping their obligations to provide TDM-compatible DS1 and DS3 circuits over hybrid loops; (4) confirm that incumbent LECs' obligations to unbundle dark fiber is not limited to dark fiber deployed prior to October 2003; (5) uphold its conclusion that the unbundling obligations imposed by section 271 are independent of the unbundling requirements of section 251; and (6) clarify that requesting carriers must be permitted to commingle elements unbundled pursuant to section 271 with network elements unbundled pursuant to section 251 and with incumbent LEC-provided services.

*FTTC.* The FCC should reject the petitioners' attempts to expand the FTTH rules to include FTTC. FTTC is not functionally equivalent to FTTH, and section 706 does not justify further relaxation of the incumbent LECs' obligation to provide unbundled access to FTTC.

*Multiunit Buildings.* The Commission should deny petitioners' requests to extend the FTTH rules to apply to fiber to multiunit buildings. As an initial matter, the FTTH rules apply only to mass market customers, and the FCC has recognized that multiunit premises are part of the enterprise market. Also, because fiber deployed to multiunit premises usually ends at the building, and does not reach the network demarcation point at the individual customer's unit, it should not be classified as FTTH. Most importantly, lifting the requirement that incumbent LECs must unbundle fiber loops deployed to multiunit buildings could deny competitive carriers access to traditional DS1 and DS3 loops, a result that is inconsistent with both the FCC's impairment analysis and its overall policy.

*Access to DS1 and DS3 Loops over Hybrid Facilities.* The Commission should deny petitioners' requests that incumbent LECs be permitted to design and construct their next-generation networks in ways that make the TDM-compatible DS1 and DS3 loops provided over hybrid facilities unavailable to requesting carriers under section 251. These requests are contrary to the FCC's bright line rule that requesting carriers have a right to receive unbundled access to the features, functions, and capabilities of TDM-compatible loops over hybrid facilities. The Commission should confirm that incumbent LECs may not unilaterally abridge or eliminate this right by engineering or constructing their networks in ways that prevent competitive carriers from obtaining access to TDM-compatible loops.

*Dark Fiber.* The Commission should deny BellSouth's request that the dark fiber unbundling obligation be limited to dark fiber loops existing as of the effective date of the *Triennial Review Order*. The impairment analysis conducted by the FCC requires that dark fiber be unbundled regardless of when it is deployed.

*Relationship between Section 271 and Section 251.* The FCC should deny requests that it relieve the Bell Operating Companies ("BOCs") of the duty to provide access to a network element under section 271 merely because the FCC does not require that element to be unbundled under section 251. The Commission has properly concluded that section 271 establishes "independent and ongoing" unbundling obligations – separate from any obligation under section 251. Moreover, to the extent that petitioners rely on section 706, their arguments run afoul of the statutory language of section 271, providing that the Commission may not limit the requirements of the competitive checklist.

*Commingling of Section 271 Elements.* The Commission should also deny BellSouth's request to limit carriers' ability to commingle section 271 elements with elements unbundled pursuant to section 251 or with incumbent LEC-provided services. Allowing incumbent LECs to break apart elements and services that are already combined within their networks would in many cases render meaningless the independent obligation to unbundle elements pursuant to section 271. The Commission should confirm that a BOC's refusal to allow such commingling would be an unjust and unreasonable practice in violation of section 201(b).

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**OPPOSITION OF MCI TO BELLSOUTH, SUREWEST AND USIIA PETITIONS FOR RECONSIDERATION**

Pursuant to the Public Notice released by the Federal Communications Commission ("FCC" or "Commission") on October 9, 2003,[1] WorldCom, Inc. d/b/a MCI ("MCI") hereby submits this Opposition to the petitions for reconsideration filed by BellSouth Corporation ("BellSouth"), SureWest Communications ("SureWest"), and the US Internet Industry Association ("USIIA") in the above-captioned proceeding.

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[1] *Petitions for Reconsideration and Clarification of Action in Rulemaking Proceeding*, CC Dkts. 01-338, 96-98 and 98-147, Public Notice, Report No. 2635 (rel. Oct. 9, 2003).

## I. THE COMMISSION SHOULD NOT IMPOSE ADDITIONAL RESTRICTIONS ON COMPETITIVE CARRIERS' ACCESS TO UNBUNDLED LOOPS

In the *Triennial Review Order*,[2] the FCC determined that section 251(c)(3) of the Communications Act of 1934, as amended (the "Act") does not require incumbent local exchange carriers ("LECs") to provide competitive carriers full access to fiber facilities that incumbent LECs deploy in their networks, including both fiber-to-the-home ("FTTH") and the fiber feeder plant in hybrid fiber-copper loops. BellSouth and its allies now seek to expand these restrictions on access by broadening the definition of FTTH to include hybrid architectures such as fiber-to-the curb ("FTTC"); extending the FTTH rules to encompass fiber-to-multiunit buildings; limiting the circumstances in which incumbent LECs must provide access to DS1 and DS3 loops over hybrid facilities; and eliminating the requirement that incumbent LECs provide access to newly-installed dark fiber. The FCC should deny each of these requests.[3]

### A. The Fiber-to-the-Home Rules Should Not Be Expanded To Encompass Fiber-To-The-Curb

BellSouth argues that FTTC should be subject to the same limited unbundling requirements as FTTH. BellSouth's argument rests on its erroneous assertions that: (1) there is no service distinction between FTTC and FTTH; and (2) treating FTTC as identical to FTTH for

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[2] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (FCC 03-36) (2003), *as modified by* Errata, 18 FCC Rcd 19020 (FCC 03-227) (2003) ("*Errata*") ("*Triennial Review Order*").

[3] For purposes of this pleading, MCI takes the decisions made in the *Triennial Review Order* as a given, and explains why petitioners' requests for further unbundling relief are inconsistent with the distinctions the FCC made between various types of services and technologies. However, reliance on the FCC's statements in the *Triennial Review Order* should not be interpreted as agreement with the FCC's analysis. For example, MCI disagrees with the Commission's decision to rely on section 706 to restrict access to bottleneck loop facilities simply because they include fiber in the loop.

unbundling purposes is consistent with the goals of section 706. As explained below, these claims are meritless.

### 1. FTTC is not "equivalent" to FTTH

BellSouth seeks to expand the unbundling relief it obtained in the *Triennial Review Order* by arguing that FTTC is "equivalent" to FTTH, and therefore should "be treated the same as FTTH for unbundling purposes."[4] The FCC, however, acted correctly when it specifically considered – and rejected – the notion that FTTC is equivalent to FTTH. In particular, the FCC looked at "'fiber-in-the-loop' network architectures," including FTTC, and expressly held that the "definition of FTTH loops excludes such intermediate fiber deployment architectures."[5]

Notwithstanding BellSouth's assertions to the contrary, the FCC was correct in classifying FTTC as an "intermediate" fiber architecture.[6] FTTC is simply the next step in the evolution of the existing network, and, unlike FTTH, does not represent a generational advance in network technology[7] – a fact that BellSouth's own CEO has previously acknowledged.[8]

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[4] BellSouth Petition at ii (Oct. 2, 2003). (Unless otherwise indicated, all petitions and *ex parte* filings cited herein were filed in CC Dkt. 01-338.)

[5] *Triennial Review Order* n.811.

[6] *See Triennial Review Order* ¶ 219 (explaining that the use of fiber feeder plant "is an augmentation of the existing network and relies on the continued use of copper (albeit to a lesser degree) in the loop plant, [whereas] FTTH is essentially a broad replacement of the existing loop plant."); *see also*, *e.g.*, Annie Lindstrom, *Can You Say FTTN?*, TELEPHONY ONLINE (Jan. 22, 2001), *available at*: <http://telephonyonline.com/ar/telecom_say_fttn/>.

[7] *See* World Wide Packets, *A Technology Paper: Fiber to the Subscriber* (viewed Nov. 5, 2003), *available at*: <http://www.wwp.com/docs/whitepapers/WWP_FTTS.pdf> (When FTTH is not possible, "FTTC presents at least a migratory step" toward a next generation network, but "it still represents a 'weak link' infrastructure due to the copper").

[8] *See There's No Place Like the Digital Home: Building for the Future*, Remarks by F. Duane Ackerman to the International Builders Show (Feb. 9, 2001), *available at*: <http://bellsouthcorp.policy.net/proactive/newsroom/release.vtml?id=35422> (in which BellSouth CEO Duane Ackerman explains that "[t]he next generation technology for new communities is fiber to the home – the final link for an all-fiber connection from our switch all the way to the home," but that while FTTH is the "ultimate platform for delivering digital services," FTTC is BellSouth's

FTTC has inherent bandwidth limitations because the signal must eventually travel over a bandwidth-limited copper channel.[9] The all-fiber channel used for FTTH, on the other hand, has "virtually limitless capacity."[10] FTTC's use of copper also makes it vulnerable to electromagnetic interference, whereas an all-fiber FTTH architecture would be essentially immune from such interference.[11] Moreover, FTTH systems are envisioned as exceedingly efficient networks – with only passive components in the system between the central office ("CO") and the customer. This drastically reduces maintenance costs and system downtime.[12] FTTC, by contrast, requires active electronics between the CO and customer, reducing efficiency and introducing additional points of failure. Thus, FTTC is not functionally equivalent to FTTH.

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"preferred solution to providing voice, high-speed data and video services to residential customers in new subdivisions."); *id.* (explaining that BellSouth can bring broadband technology "to the curb" but that homebuilders will "have to bring the fat pipe into the house.").

9 As BellSouth admits, FTTC relies on "copper and/or coaxial drops" to reach the customer. BellSouth Petition at 4. Under the framework established in the *Triennial Review Order,* these "customer drops" are considered to be part of an incumbent LEC's distribution plant, *Triennial Review Order* n.663, and must be provided on an unbundled basis as a copper subloop. *See, e.g.*, *Triennial Review Order* ¶ 254.

10 Eluminant, *Asynchronous Transfer Mode (ATM), Passive Optical Networks (PONs)* at 4 (viewed Nov. 5, 2003) ("Eluminant Tutorial"), *available at*: <http://www.iec.org/online/tutorials/acrobat/atm_pon.pdf>.

11 *See, e.g.,* Eluminant Tutorial at 4 ("fiber-optic technology is not influenced by electronic interferers such as cross-talk between copper pairs."); *see also* NEWTON'S TELECOM DICTIONARY 616 (16th ed. 2000) (entry for "Optical Fiber" notes that "Fiber is immune to electromagnetic interference").

12 BellSouth's own CTO has been quoted as saying "I love the PON [Passive Optical Network] architecture. Anytime you can remove active components from a harsh environment you've done a good day's work." Dave Burstein, *DSL Prime: Why Fiber Is Now* (June 3, 2003), *available at*: <http://www.isp-planet.com/cplanet/tech/2003/prime_letter_030603_fiber_now.html>.

### 2. Section 706 does not support removal of the incumbent LECs' obligation to provide unbundled access to FTTC

By removing unbundling obligations with respect to FTTH, the FCC intended to promote the goals of section 706 by providing incumbent LECs an incentive to invest in new broadband technologies and services that they would not otherwise deploy to serve mass market customers.[13] Even assuming such incentives were necessary for FTTH,[14] they are not necessary for FTTC. Unlike FTTH, FTTC is not "in its infancy."[15] Indeed, by its own admission, BellSouth is already deploying FTTC to a high percentage of customers in "new build" situations.[16]

Moreover, despite BellSouth's attempt to cloak its petition in the language of "next-generation broadband,"[17] its request is entirely about narrowband and non-packet-switched technologies that have been in BellSouth's network for decades. BellSouth's requested rule change would simply expand the range of circumstances in which there is no requirement that the incumbent LEC unbundle DS1 and DS3 loops or provide a narrowband channel for use by

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[13] *See, e.g., Triennial Review Order* ¶¶ 213; 278-279.

[14] As the Commission noted in the *Triennial Review Order,* the evidence in the record was inconclusive regarding the effect of unbundling on capital investment. *Triennial Review Order* ¶ 178.

[15] *Triennial Review Order* ¶ 274. BellSouth claims that by the end of 2003 it will serve one million homes over fiber distribution plant. *Fiber Loops* at 3, attached to Letter from Jonathan Banks, BellSouth, to Marlene Dortch, FCC (Sept. 30, 2003) ("BellSouth 9/30 *ex parte*"). Competitive carriers should not be denied access to these homes, particularly given that there is no indication that these are true "new build" facilities.

[16] *See* BellSouth 9/30 *ex parte* at 10 (of 315,000 new homes built in BellSouth territory this year, BellSouth will serve 135,000 with FTTC). By contrast, the *Triennial Review Order* cites estimates that FTTH has been deployed to only 26,000 homes nationwide. *Triennial Review Order* ¶ 227.

[17] BellSouth Petition at 3.

competing voice providers.[18] Thus BellSouth's petition appears to be little more than an attempt to take the section 706 analysis that the FCC employed in the mass market context and improperly extend it to enterprise-level DS1 and DS3 circuits.[19]

Eliminating access to FTTC loops would cripple competitive carriers' ability to serve large numbers of customers without providing any significant broadband benefit. Extending the FTTH rules to encompass hybrid loops such as FTTC would not materially advance the goals of section 706, because "intermediate fiber deployment architectures" such as FTTC, which include copper in the loop, are simply incapable of matching the broadband capacity of all-fiber loops.[20] In fact, if the FCC is correct that relieving the incumbent LECs of their unbundling obligations increases their incentives to deploy particular types of facilities, then expanding the unbundling relief afforded to FTTH to include FTTC would thwart the goals of section 706 by encouraging deployment of FTTC instead of the more robust FTTH.[21]

### B. The FCC Should Not Extend Its FTTH Rules To Encompass Fiber-To-Multiunit-Buildings

BellSouth and SureWest argue that the FCC should "clarify" that the FTTH rules apply to fiber deployed to multiunit buildings.[22] As explained below, such a "clarification" would be in

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[18] BellSouth's proposal would not change the unbundling obligation with respect to competing DSL providers, because that obligation is already eliminated for all hybrid loops.

[19] This concern is compounded by the fact that if the FCC were to expand its FTTH rules to include FTTC, the result would be to limit the incumbent LECs' unbundling obligations for existing or "overbuilt" fiber.

[20] *See Triennial Review Order* n.811 and discussion above regarding virtually limitless capacity of all-fiber loops.

[21] This danger is clear from BellSouth's petition, in which BellSouth plainly states its view that FTTC can be "a final stage architecture, rather than merely transitional." BellSouth Petition at 6. This view is at odds with the FCC's goal of providing the incumbent LECs incentives to deploy true FTTH in their networks.

[22] BellSouth Petition at 9-10; SureWest Petition at 2-4 (Oct. 2, 2003).

direct conflict with several findings the FCC made in the *Triennial Review Order* regarding the classification of multiunit buildings, the definition of FTTH and the manner in which carriers make deployment decisions.

### 1. Multiunit premises are part of the enterprise market

In the *Triennial Review Order*, the FCC explained that the FTTH rules apply only to fiber deployed to mass market customers.[23] The FCC also explained that facilities deployed to multiunit buildings fall under the rules applying to enterprise customers, regardless of whether the specific customer being served is a residential or business customer.[24] The FCC's conclusion regarding the proper classification of multiunit buildings was based on its finding that the barriers competitive carriers face in accessing these buildings resemble those associated with serving enterprise customers, even if the particular end user being served is a mass market customer.[25] BellSouth has presented no evidence that would compel the FCC to revisit these decisions.

SureWest and USIIA attempt to circumvent the limitations on the FTTH rules by proposing that the mass market be redefined to include any location using up to 48 telephone numbers.[26] These proposals must be rejected. Drawing the line at 48 telephone numbers would

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[23] *See* discussion in section I.D. below.

[24] *Triennial Review Order* n.624 ("the conclusions we reach for high-capacity loops in the enterprise market apply equally to mass market customers in multiunit premises."). This conclusion regarding high-capacity loops does not diminish incumbent LECs' obligation to provide unbundled access to local switching to requesting carriers for serving customers over DS0 loops. *See, e.g., id.* ¶ 497.

[25] *Id.* ¶ 347 & n.624 ("When customers typically associated with the mass market reside in multiunit premises, carriers seeking to self-deploy their own facilities to serve these customers face the same barriers as when serving multiunit premise-based enterprise customers."); *id.* n.1040. In deploying loops to multiunit buildings carriers face barriers, such as building access problems, that are not present with other types of mass market deployment. *Id.* ¶¶ 205, 348.

[26] SureWest Petition at 7; USIIA Petition at 3 (Oct. 2, 2003).

be inconsistent with the FCC's decision to exclude customers with more than three phone lines from its definition of the mass market for purposes of its unbundled switching analysis.[27] SureWest, moreover, suggests that it has picked 48 telephone numbers because that is the equivalent of two DS1 loops.[28] The FCC, however, has stated that DS1 loops are typically used to serve enterprise customers and required that they be unbundled, subject to state review.[29]

### 2. The FCC should preserve competitive carriers' access to multiunit buildings

BellSouth and SureWest argue that the rules are "unclear" regarding the treatment of fiber loop facilities deployed to a multiunit building and ask the FCC to "clarify" that incumbent LECs are not required to unbundle fiber to multiunit buildings.[30] As an initial matter, the FCC's rules are not "ambiguous":[31] Because incumbent LECs generally rely on copper subloops to complete the connection to the network demarcation point at the individual customer's unit,[32] fiber to multiunit buildings is properly classified as an "intermediate" "fiber-in-the-loop" architecture that is distinct from FTTH.[33]

Nonetheless, BellSouth argues that it should not be required to unbundle fiber loops deployed to multiunit premises. This request should be rejected. Granting BellSouth's requested rule change would deny competitive carriers access to traditional DS1 and DS3 loops to

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27 *Triennial Review Order* ¶ 525.

28 SureWest Petition at 7.

29 *See, e.g., Triennial Review Order* n.624; *id.* ¶ 209.

30 BellSouth Petition at 9; SureWest Petition at 3.

31 *See* SureWest Petition at 3.

32 *See* BellSouth Petition at 9-10.

33 *Triennial Review Order* n.811 (holding that the "definition of FTTH excludes . . . intermediate fiber deployment architectures" such as fiber-to-the-building). This distinction is consistent with the FCC's view that competitive carriers must be allowed unbundled access to loops deployed to multiunit buildings.

multiunit buildings. This result would be inconsistent with both the FCC's impairment analysis[34] and its overall policy.[35] Expanding the scope of the FTTH rules to include fiber to multiunit buildings would deprive competitive carriers of the ability to serve customers in multiunit buildings via DS1 or DS3 circuits provided over fiber facilities, causing service disruptions to end users and eliminating an important source of revenue for new entrants.

This treatment of loops used to serve multiunit buildings would be inconsistent with the FCC's efforts to promote competitive carriers' access to customers in such buildings. For example, the FCC expressly preserved competitive carriers' access to subloop unbundling to reach "all customers residing in multiunit premises,"[36] regardless of the "type or capacity of the loop the requesting carrier will provide."[37] As these statements demonstrate, the current rules are essential to preserving competitive choice for customers located in multiunit buildings.

### 3. Expanding the unbundling exception will not increase incumbent LECs' incentives to deploy fiber

BellSouth and SureWest argue that if the FCC does not alter the unbundling requirements for multiunit buildings, incumbent LECs will have to "pick and choose locations" rather than "sweep an entire community" in their broadband deployment.[38] This argument ignores the realities of the marketplace. BellSouth and other incumbent LECs are extending their fiber networks in any case; they will extend their fiber networks in situations in which it makes

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[34] *Triennial Review Order* ¶ 325 (making a national finding that requesting carriers are impaired without access to DS1 loops); *id.* ¶ 320 (making a national finding that requesting carriers are impaired on a customer-location-specific basis without access to DS3 loops).

[35] *See id.* ¶¶ 291-295 (preserving competitive access to TDM-compatible DS1 and DS3 loops); *see also id.* n.815 (preserving access to TDM-compatible DS1s and DS3s is a "key part of HTBC's proposal.").

[36] *Id.* ¶ 347.

[37] *Id.* ¶ 347 & n.1041.

[38] SureWest Petition at 3; BellSouth Petition at 9.

economic sense to do so. The incumbent LECs have already been relieved of the obligation to provide unbundled access to the packet switched features, functions and capabilities of hybrid loops. It is unclear why BellSouth needs additional incentives to deploy fiber facilities to mass market customers,[39] particularly given that "[f]iber-optic networks are simple, more reliable, and less costly to maintain than copper-based systems."[40]

### C. The FCC Should Not Permit Incumbent LECs To Construct Networks In Ways That Make TDM-Compatible DS1 And DS3 Loops Provided Over Hybrid Facilities Unavailable To Requesting Carriers

BellSouth and SureWest urge the Commission to "clarify" that incumbent LECs can design, configure, and construct their next-generation networks in ways that make the time division multiplexing ("TDM") compatible features, functions, and capabilities of hybrid loops – including DS1 and DS3 capacity loops – unavailable to requesting carriers under section 251.[41] These requests are contrary to the relevant findings and policies set forth in the *Triennial Review Order*. BellSouth and SureWest present no new evidence or analysis that should cause the FCC to revisit these findings or policies, and their requests therefore should be denied.

BellSouth and SureWest claim that requiring incumbent LECs to unbundle the TDM-compatible features of hybrid loops is "inconsisten[t]" with the goal of promoting the deployment of advanced services under section 706.[42] This is simply false.[43] The FCC drew a

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[39] *See Triennial Review Order* ¶ 272 (explaining that relieving incumbent LECs of the obligation to unbundle the packet-based capabilities of hybrid loops provides incumbent LECs with sufficient incentives to expand their deployment of fiber-based networks).

[40] Eluminant Tutorial at 4.

[41] BellSouth Petition at iii, 16-17; SureWest Petition at 8-9.

[42] SureWest Petition at 8; *see also* BellSouth Petition at 16; 47 U.S.C. § 157(a) Note, Ancillary Laws and Directives (Section 706 of the 1996 Act, P.L. 104-104, Title VII).

[43] The following discussion of the FCC's reasoning in the *Triennial Review Order* should not be read as an endorsement of the FCC's treatment of section 706 and 251(d)(2)'s "at a minimum"

"bright line" between "packet-switched equipment versus TDM-based equipment,"[44] finding that although the former technology is not subject to unbundling, in accord with section 706,[45] the latter technology is subject to unbundling because it is typically used for "old" or "traditional" services (*i.e.*, "narrowband services . . . and high-capacity services like DS1 and DS3 circuits") – rather than for the "new" packet-switched services that the FCC thought are most likely to achieve the goal of section 706.[46] Consistent with this bright-line distinction, the essence of which the Commission reiterates at various points in the *Triennial Review Order*,[47] requesting carriers have a right to obtain unbundled access to the TDM-compatible features, functions, and capabilities of an incumbent LEC's hybrid loops for the purpose of providing either narrowband services or high-capacity services over DS1 or DS3 circuits.[48]

In explaining its bright-line rule, the Commission emphasized that incumbent LECs could not "eliminate" or diminish the "rights competitive LECs have to obtain unbundled access to hybrid loops capable of providing DS1 and DS3 service to customers."[49] For instance, the Commission expressly "prohibit[ed] incumbent LECs from engineering the transmission capabilities of their loops in a way that would disrupt or degrade the local loop unbundled

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language, or of the FCC's attempt to classify packet-switched equipment as "new" technology that is somehow protected from unbundling.

44 *Triennial Review Order* ¶ 293. The FCC emphasized that this "bright line" is "based on technological boundaries rather than . . . some other factor." *Id.*

45 *See, e.g., id.* ¶ 213.

46 *Id.* ¶¶ 200 n.627, 290, 293. *See also id.* ¶ 173 n.557 (stating that the FCC's approach with respect to section 706 is "entirely consistent" with the Preamble to the 1996 Act, which emphasizes "the rapid deployment of *new* telecommunications technologies," and with section 7(a), which states that "[i]t shall be the policy of the United States to encourage the provision of *new* technologies and services to the public.") (emphasis added).

47 *See, e.g., Triennial Review Order* ¶¶ 199-200 & n.627, ¶¶ 289-297.

48 *See, e.g., id.* ¶ 200 n.627.

49 *Id.* ¶ 294.

network elements ("UNEs") (either hybrid loops or stand-alone copper loops) provided to competitive LECs."[50] The Commission also explained that "the construction of new facilities does not in itself alter a competitive LEC's ability to use the incumbent's [hybrid] network."[51] Furthermore, the Commission found that incumbent LECs have both the means and the obligation to "present requesting carriers a technically feasible method of unbundled access" to the TDM-compatible features of hybrid loops.[52] Thus, there is no need for clarification.

To the extent that SureWest and BellSouth are seeking reconsideration rather than clarification, their requests should be denied, because their proposed changes are inconsistent with the logic underlying the FCC's decisions in the *Triennial Review Order*.[53] For instance, the FCC expressly predicated its decision not to require unbundling of packetized technologies on the assumption that requesting carriers would continue to have unbundled access to "other loop alternatives within the networks of incumbent LECs," including "TDM-based loops, such as DS1s and DS3s, [which] provide competitive LECs with a range of options for providing broadband capabilities."[54] Allowing incumbent LECs to engineer their networks in the ways requested by BellSouth and SureWest would allow incumbents to build networks in which DS1s

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[50] *Id.*

[51] *Id.* ¶ 296 n.851. SureWest is incorrect in claiming that "no unbundling is required for DS1 and DS3 loops where there is no TDM capability." SureWest Petition at 8. In fact, incumbent LECs must make DS1 and DS3 loops available nationwide, subject to state review regarding impairment.

[52] *Triennial Review Order* ¶ 297 & n.855 (noting, *inter alia*, that "manufacturers either already account for an incumbent LEC's regulatory obligations in designing equipment (and software to upgrade that equipment) or are planning to do so.").

[53] *See, e.g., id.* ¶¶ 213, 286.

[54] *Id.* ¶ 291. MCI disagrees with the FCC's attempts to limit competitors access to other types of loops, such as packetized DS0 loops.

and DS3s are unavailable, even where the FCC and the states have found impairment. Such a result would undermine the Commission's decision with respect to high-capacity loops.[55]

In addition, the Commission should reaffirm its decision in the *Triennial Review Order* prohibiting incumbent LECs from refusing to provide unbundled access to the TDM features of their hybrid loops based on claims that existing facilities are not available.[56] Similarly, the Commission should deny BellSouth's request that an incumbent LEC be relieved of the duty to deploy a new multiplexer that provides TDM functionality if it does not plan to do so for its own customers.[57] The issue is not whether an incumbent plans to deploy a particular type of equipment at a specific location, but whether the incumbent regularly deploys such equipment for its own customers. The Commission has found that incumbent LECs routinely attach multiplexers to existing loops, and that performing such functions is easily accomplished.[58]

Finally, the FCC should not modify the definition of "routine network modifications" in Rule 51.319(a)(8) as requested by SureWest.[59] SureWest's request is intended to limit the

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[55] With respect to FTTH, the Commission recognized that granting the incumbent LECs "sole control" of an entry barrier – specifically, the "decision to replace pre-existing copper loops with FTTH" – would be highly problematic. *Triennial Review Order* ¶ 277. The Commission therefore found that in a FTTH overbuild situation, incumbents must ensure "continued access to an unbundled transmission path suitable for providing narrowband services to customers served by FTTH loops." *Id.* The same reasoning supports requiring incumbent LECs to provide continued access to the TDM features of their hybrid loops, undiminished by any engineering decision within the incumbents' "sole control."

[56] An incumbent LEC can refuse to unbundle network elements based on an absence of facilities only if specific criteria set forth in the *Triennial Review Order* and the rules are satisfied. *See id.* ¶¶ 630-648. In general, an incumbent LEC can deny access based on a claim of "no facilities" only if it would have to install new aerial or buried cabling to meet the request. *See id.* ¶¶ 634, 636-37.

[57] BellSouth Petition at iii, 17.

[58] *Triennial Review Order* ¶ 635.

[59] SureWest Petition at 9.

obligation of incumbent LECs to provide unbundled access to TDM-compatible features of hybrid loops – an obligation that should not be limited for the reasons discussed above.

### D. The FCC's Rules Require Incumbent LECs To Unbundle Newly Installed Enterprise Dark Fiber

BellSouth argues that there is an "apparent conflict"[60] between section 51.319(a)(3)(i) of the FCC's rules, which states that incumbent LECs are not required to unbundle newly-built FTTH loops (whether dark or lit) "to an end user's customer premises,"[61] and section 51.319(a)(6), which states that an incumbent LEC must unbundle dark fiber loops unless a state commission has found either that a self-provisioning trigger is met or requesting carriers would not be impaired without access to such loops.[62] To resolve the perceived "conflict," BellSouth requests that the Commission "limit the dark fiber unbundling obligation to enterprise dark fiber loops existing as of the effective date of the [*Triennial Review*] *Order*."[63] The Commission should deny this request because: (1) there is no "conflict" between subsections (a)(3)(i) and (a)(6); (2) the record in the *Triennial Review* proceeding supports the unbundling of enterprise market dark fiber, regardless of when it is deployed; and (3) adopting BellSouth's request would conflict with other aspects of the *Triennial Review Order*.

The "apparent conflict" posited by BellSouth vanishes once subsections (a)(3)(i) and (a)(6) are read in the context of the discussion of those rules in the *Triennial Review Order*. That discussion makes clear that section 51.319(a)(3)(i) applies to fiber loops typically used to serve mass market customers, while section 51.319(a)(6) applies to dark fiber loops used to provide

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[60] BellSouth Petition at 18.

[61] 47 C.F.R. § 51.319(a)(3).

[62] 47 C.F.R. § 51.319(a)(6).

[63] BellSouth Petition at 18.

enterprise-level services (*i.e.*, DS1 and higher).[64] Thus, there is no conflict between these two subsections. Under subsection (a)(3)(i), an incumbent LEC need not unbundle fiber that is newly deployed to a mass market customer's "premises"; and under subsection (a)(6), an incumbent LEC must unbundle all dark fiber serving enterprise customers (regardless of when such dark fiber is deployed), absent a contrary determination by a state commission.

This interpretation is consistent with the *Errata* to the *Triennial Review Order*, in which the Commission replaced the term "residential unit" in section 51.319(a)(3)(i) with "end user's customer premises."[65] Because the term "premises" is broader than "residential unit," and covers both small business locations as well as residences, this change simply clarified that subsection (a)(3)(i) applies to all mass market customers – *i.e.*, small businesses (such as gas stations or convenience stores) – as well as individual residential customers. The change reflected in the *Errata* did not expand subsection (a)(3)(i) beyond the mass market to encompass larger business customers' premises.

The Commission's analysis for unbundling enterprise dark fiber applies with equal force to "new" and "old" dark fiber. In finding requesting carriers to be impaired without access to

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[64] The unbundling rules that are codified in subsection (a)(3)(i) are discussed under the general subheading "Mass Market Loops." *Triennial Review Order* ¶¶ 211-297. FTTH Loops are discussed within this section, at paragraphs 273-284. By contrast, the unbundling rules that are codified in subsection (a)(6) are discussed under the general subheading "Enterprise Market Loops." *Id.* ¶¶ 298-342. "Dark Fiber Loops" are discussed within this section, at paragraphs 311-314.

[65] *Errata* ¶ 38. This interpretation is also consistent with the "overbuild" requirement of section 51.319(a)(3), which states that, if an incumbent LEC retires a copper loop that has been replaced with an FTTH loop, the incumbent must provide unbundled access "to a 64 kilobits per second transmission path capable of voice grade service" over the FTTH loop. 47 C.F.R. § 51.319(a)(3)(ii)(C). The FCC has found that a 64 kilobit path is used primarily to serve mass market customers. *Triennial Review Order* n.624 ("voice-grade analog loops [and] DS0 loops . . . are used to serve customers typically associated with the mass market"); *id.* ¶ 277 (noting that the unbundling of a 64 kbps path in FTTH overbuild situations is intended to ensure continued access to local loops suitable for providing services to the mass market).

unbundled enterprise dark fiber loops, the Commission relied principally on the "substantial fixed and sunk costs" of deploying dark fiber, as well as other barriers such as: the lack of alternatives at specific customer locations, the inability to obtain reasonable and timely access to the customer's premises, and the need to convince customers to accept the delays and uncertainty associated with the deployment of alternative loop facilities.[66] In describing these barriers, the Commission nowhere stated or suggested that they exist only or primarily for dark fiber that has already been deployed. To the contrary, the Commission explicitly stated that the various barriers to self-deployment by competitors are generally "inherent in deploying alternative fiber loops."[67] These "inherent" barriers did not suddenly disappear on October 2, 2003, as suggested by BellSouth.[68] The Commission therefore should deny BellSouth's request regarding dark fiber.

## II. THE FCC SHOULD NOT DIMINISH THE BOCS' OBLIGATIONS WITH RESPECT TO SECTION 271 NETWORK ELEMENTS

### A. The Unbundling Requirements Of Section 271 Are Independent From The Access Requirements Of Section 251

BellSouth and USIIA urge the FCC to "clarify" or "confirm" that the Bell Operating Companies ("BOCs") do not need to unbundle "broadband services" under section 271 because any unbundling requirement under section 271 is inconsistent with the FCC's unbundling

[66] *Triennial Review Order* ¶ 312.

[67] *Id.*

[68] Indeed, limiting the obligation to unbundle enterprise dark fiber to include only fiber deployed as of October 2 would undermine the Commission's decisions regarding the impairment analysis for other network elements. For instance, the wholesale facilities trigger for high-capacity loops can be satisfied by the existence of dark fiber, including dark fiber obtained as a UNE. *Id.* ¶ 337. If the Commission were to exclude fiber deployed after October 2, 2003 from consideration as part of the trigger, it would risk delaying the satisfaction of this trigger.

analysis under section 251.[69] According to BellSouth and USIIA, the access requirements under section 271 are "co-extensive" with the unbundling obligations under section 251, and thus the elimination of any section 251 unbundling obligations with regard to broadband elements similarly eliminates any section 271 access obligation with regard to those same elements.[70] These arguments are without merit. As explained below, the Commission has repeatedly stated that section 271(c)(2)(B) of the Act establishes an "independent and ongoing" obligation for the BOCs to provide access to checklist items that is separate from an incumbent LEC's unbundling duties under section 251.[71] Neither BellSouth nor USIIA raises any argument or cites any precedent that would warrant departing from this conclusion.[72]

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[69] BellSouth Petition at iii, 10-12; USIIA Petition at 3-10.

[70] *See* BellSouth Petition at 10-15; USIIA Petition at 3-10. BellSouth and USIIA repeatedly claim that the BOCs' unbundling obligation under sections 271 do not apply to "broadband" or to "broadband services." *See, e.g.*, BellSouth Petition at 11; USIIA Petition at 3. In fact, the Commission found – as it had to under the Act – that section 271 imposes an independent unbundling obligation with respect to the enumerated network elements (*i.e.*, loops, transport, switching, and signaling). *See, e.g., Triennial Review Order* ¶¶ 653-656. These network elements can be used to provide a number of services, including broadband services.

[71] *Triennial Review Order* ¶ 654. *See also id.* ¶ 653 (under section 271's competitive checklist, the BOCs must continue to "provide access to loops, switching, transport, and signaling *regardless of any unbundling analysis under section 251*.") (emphasis added); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, ¶ 471 (1999) ("*UNE Remand Order*"); *Commission Establishes Comment Cycle for New Verizon Petition Requesting Forbearance from Application of Section 271*, CC Dkt. 01-338, Public Notice, FCC 03-263 (rel. Oct. 27, 2003) (denying Verizon's Petition for Forbearance with respect to any "narrowband elements" that do not have to be unbundled under section 251 and establishing a comment cycle for Verizon's new Petition for Forbearance from all "broadband access obligations.")

[72] BellSouth itself seems to lack conviction that sections 251 and 271 are "co-extensive." Less than a week after seeking clarification or reconsideration of the *Triennial Review Order*, BellSouth filed a petition for forbearance from certain unbundling obligations in which it noted that the potential harm from granting its petition would be minimized by the fact that "network elements that the Commission removes from the section 251 unbundling requirement . . . would continue to be subject to the unbundling requirements of section 271." *Petition of BellSouth Telecommunications, Inc. for Forbearance Under 47 U.S.C. 160(c) from Application of Sections*

In fact, in the *Triennial Review Order*, the FCC conducted an extensive analysis – none of which is refuted by either BellSouth or USIIA – before concluding that section 271 imposes an independent access obligation on the BOCs with respect to checklist items 4-6 and 10. The FCC's conclusion was based on "the plain language and the structure of section 271(c)(2)(B),"[73] as well as the distinct purposes of sections 251 and 271.[74] If Congress had intended the unbundling requirements under section 271 merely to be "coextensive" with those in section 251, as BellSouth and USIIA suggest, it would have made the requirements identical. Indeed, Congress did exactly that in the second checklist item, which incorporates by reference the unbundling requirements of section 251(c)(3).[75] But Congress also added independent checklist items, including the network elements listed in items 4-6 and 10.[76] Under BellSouth's proposed reading of section 271, these checklist items would be rendered mere "surplusage," violating a cardinal principle of statutory construction; namely, the duty to give effect to every word and every clause of a statute.[77]

As the Commission also recognized in the *Triennial Review Order*, the different requirements of sections 251 and 271 reflect the distinct purposes that Congress intended these sections to serve.[78] Section 251 applies broadly to all incumbent LECs because that section is

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*251(c)(3), (4) and (6) in New-Build, Multi-Premises Developments*, CC Dkt. 03-220, Petition at 9 (Oct. 8, 2003).

[73] *Triennial Review Order* ¶ 654.

[74] *Id.* ¶¶ 654-655.

[75] 47 U.S.C. § 271(c)(2)(B)(ii).

[76] 47 U.S.C. § 271(c)(2)(B)(iv), (v), (vi) and (x).

[77] *See, e.g., Duncan v. Walker*, 533 U.S. 167, 174 (2001); *Triennial Review Order* ¶ 654.

[78] *Triennial Review Order* ¶ 655.

"designed to ensure a minimum level of openness in the local market."[79] By contrast, section 271 applies only to a subset of incumbent LECs: those BOCs that voluntarily seek to offer in-region interLATA service. In particular, Congress included a "competitive checklist" in section 271 that applies to the BOCs regardless of any determination the Commission makes under section 251.

Unable to controvert the Commission's interpretation of the plain language, structure, and purpose of section 271, BellSouth claims that the existence of an independent access obligation under section 271 "cannot be reconciled" with the D.C. Circuit's *USTA* decision and the FCC's section 271 orders.[80] These precedents are inapposite, however. The *USTA* decision relates only to the duty to unbundle network elements under section 251, and makes no mention of the unbundling obligations of section 271.[81] Likewise, the FCC's statements in its section 271 orders do not contradict its finding in the *UNE Remand Order* and *Triennial Review Order* that the section 271 checklist access obligations are independent of those contained in its section 251 unbundling rules.[82] Contrary to BellSouth's claim, for instance, the FCC did not find in the *Qwest Nine-State Order* that Qwest had no duty under section 271 to offer access to unbundled local switching for certain customers with four or more lines.[83] Rather, the FCC's finding that

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[79] *Id.*

[80] BellSouth Petition at 12.

[81] *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA*").

[82] There is no legal relevance to BellSouth's claim that in several section 271 orders, the Commission noted SBC's compliance with the rules adopted in *UNE Remand Order* in finding that SBC had satisfied checklist item 6. BellSouth Petition at 13. BellSouth fails to point out that in *UNE Remand Order* (as in the *Triennial Review Order*), the Commission found that section 271 imposes an independent unbundling obligation on the BOCs, which is separate from the obligations of section 251. *See UNE Remand Order* ¶ 471. It would not make sense to interpret the Commission's citation of the *UNE Remand Order* as evidence that the Commission had decided to invalidate a key finding of that order.

[83] BellSouth Petition at 13 (citing 47 C.F.R. § 51.319).

Qwest had satisfied checklist item 6 was based on the existence of a statement of generally available terms and conditions ("SGAT") that made available (at market-based rates) density zone 1 switching with four or more lines.[84]

Similarly, there is no merit to BellSouth's argument that checklist items 4-5 and 10 "reflect Congress's minimum expectations at the time the Act was passed, in case Section 271 applications were filed before the Commission adopted rules implementing Section 251."[85] Tellingly, BellSouth cites no support for this claim – an omission that is hardly surprising, since the Commission was required to issue rules implementing section 251 within six months of the enactment of the 1996 Act.[86] Since the Commission has ninety days to rule on section 271 applications,[87] there was at most only a three-month window during which the Commission theoretically could have granted a section 271 application prior to adopting the rules implementing section 251. The timeframes for negotiation, arbitration, and approval of interconnection agreements established in section 252, and the limitation on a BOC's ability to rely on an SGAT to demonstrate compliance with section 271, make it highly unlikely that any BOC would have been in a position to file a section 271 application within six months of

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[84] *Application of Qwest Communications International, Inc.*, 17 FCC Rcd 26303, ¶ 359 (2002) ("*Qwest Nine-State Order*") (citing SGATs for Colorado, Utah, and Washington); Colorado SGAT, Ninth Revision, § 9.11.2.5 (March 4, 2003); Utah SGAT, Seventh Revision, § 9.11.2.5 (Oct. 31, 2002); Washington SGAT, Eighth Revision, § 9.11.2.5 (June 25, 2002); *available at*: <http://www.qwest.com/about/policy/sgats>. Moreover, the switching carveout exception had limited practical relevance to Qwest's compliance with checklist item 6 because, as the FCC noted, Qwest "has never enforced the switching carveout in the three states where the exception applies." *Qwest Nine-State Order* ¶ 361.

[85] BellSouth Petition at 14.

[86] 47 U.S.C. § 251(d)(1).

[87] 47 U.S.C. § 271(d)(3).

enactment.[88] It is implausible that Congress expected the FCC to review and grant a section 271 application so soon after the passage of the Act.

Finally, there is no merit to BellSouth and USIIA's claim that section 706 of the Act is relevant to determining the BOCs' access obligations under section 271. BellSouth and USIIA argue that, because the Commission relied on section 706 to refrain from requiring the unbundling of certain network elements under section 251, it "could not rationally conclude" that the BOCs must provide independent access to those elements under section 271.[89] This argument ignores the fact that the Commission found that section 706 was relevant to the unbundling analysis under section 251 only because the "at a minimum" clause of section 251(d)(2) granted the FCC authority "to take Congress's goals into account" in deciding which network elements must be unbundled.[90] Section 271, by contrast, does not contain an "at a minimum clause"; in fact, it expressly prohibits the Commission from "limit[ing] or extend[ing] the terms used in the competitive checklist set forth in subsection (c)(2)(B)."[91] The Commission therefore may not rely on section 706 to limit the terms of the competitive checklist.

### B. The FCC Should Clarify That The BOCs Must Permit Commingling Of Section 271 Elements With UNEs And Incumbent LEC Services

BellSouth urges the Commission to state that "services 'unbundled' only under section 271 need not be combined with either other services or UNEs."[92] The Commission should deny

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[88] *See* 47 U.S.C. §§ 252(b)(4)(C) & (e)(4), 271(c)(1)(B).

[89] BellSouth Petition at 11; *see also* USIIA Petition at 9-10.

[90] *Triennial Review Order* ¶ 176. As noted above, MCI does not agree with the FCC's treatment of section 706 and the "at a minimum" language in section 251(d)(2). Even if the Commission's interpretation were permissible under section 251, however, it is clearly prohibited under section 271.

[91] 47 U.S.C. § 271(d)(4).

[92] BellSouth Petition at 15. BellSouth's request relates solely to "transmission, switching, transport, or signaling" – *i.e.*, to checklist items 4-6 and 10.

this request. Instead, the FCC should clarify that the BOCs are required to permit commingling of elements unbundled under checklist items 4, 5, 6, and 10 with UNEs and incumbent LEC services.

If the Commission were to relieve the BOCs of the duty to commingle section 271 elements with UNEs or incumbent LEC services, it would render the section 271 access requirements meaningless. In many cases, a section 271 element would be useless if it could not be commingled with other elements or services provided by the incumbent LEC. For example, access to unbundled switching pursuant to section 271(c)(2)(B)(vi) serves no purpose unless the switch is connected to an incumbent LEC-provided loop. Similarly, in the vast majority of cases, a fiber loop provided pursuant to section 271(c)(2)(B)(iv) would be useless without incumbent LEC-provided transport or special access services. It would be passing strange if the FCC were to impose an "independent and ongoing obligation" on the BOCs to provide access to loops, transport, switching, and signaling under section 271, but render those elements useless by declining to require the BOCs to commingle them with section 251 UNEs or incumbent LEC services.

The fact that items 4-6 and 10 of the checklist do not mention "combining," and do not refer back to the combination requirement set forth in section 251(c)(3), has no bearing on whether section 271 requires the BOCs to permit commingling of section 271 elements with section 251 UNEs or incumbent LEC services.[93] As the Supreme Court has explained, "it is not self-evident that in obligating incumbents to furnish [elements], Congress negated a duty to combine that is not inconsistent with the obligation to furnish, but not expressly mentioned."[94]

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[93] *Triennial Review Order* ¶ 656 n.1989.

[94] *Verizon v. FCC*, 535 U.S. 467, 533-34 (2002).

Indeed, "it takes a stretch to get from permissive statutory silence to a statutory right on the part of the incumbents to refuse to combine for a requesting carrier."[95]

Denying carriers the ability to commingle section 271 elements with section 251 UNEs or incumbent LEC services would be an unjust and unreasonable practice prohibited by section 201(b) of the Act. In the *Triennial Review Order*, the Commission found that checklist network elements that do not satisfy the unbundling standard in section 251(d)(2) must be provided on a just and reasonable basis, in accord with section 201(b) of the Act.[96] Loops, transport, switching, and signaling are already combined within the BOCs' networks, as they must be for the BOCs to provide services to their own customers.[97] It would be unjust and unreasonable for the BOCs to break apart these elements when they provide them to requesting carriers. Indeed, the sole reason for the BOCs to go through the effort of breaking apart these already-connected elements would be to put competitive carriers at a disadvantage.[98] The Commission therefore should clarify that section 271 requires the BOCs to permit commingling of section 271 elements with section 251 UNEs and incumbent LEC services.

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[95] *Id.* at 534.

[96] *Triennial Review Order* ¶ 662; *see also id.* ¶¶ 656-664; *UNE Remand Order* ¶ 470; 47 U.S.C. § 201(b).

[97] As the U.S. Supreme Court has explained, unbundling obligations are not about physically breaking network components apart into their smallest possible units. Rather, unbundling is "about lease pricing." *Verizon v. FCC*, 535 U.S. at 531 ("To provide a network element 'on an unbundled basis' is to lease the element, however described, to a requesting carrier at a stated price specific to that element.").

[98] *See Verizon v. FCC*, 535 U.S. at 534-35 (explaining that it is reasonable to prevent incumbent LECs from "dismantling existing combinations to sabotage competitors"), citing *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 395 (1999).

## III. CONCLUSION

For the foregoing reasons, MCI urges the Commission to deny the petitions for reconsideration filed by BellSouth, USIIA and SureWest.

Respectfully submitted,


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November 6, 2003

## CERTIFICATE OF SERVICE

I, Ruth E. Holder, hereby certify that on this 6th day of November, 2003, I caused true and correct copies of the foregoing Opposition of MCI to BellSouth, SureWest and USIIA Petitions for Reconsideration to be mailed, via first class U.S. Postal Service mail, to:

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